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No. 87-1201

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1988

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and
MYLES OSTERNECK and GUY-KENNETH OSTERNECK
as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Petitioners,

v.

ERNST & WHINNEY,

Respondent.

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

This Court has rejected an approach to 28 U.S.C. § 1291 which depends on a characterization of a post-judgment motion as requesting “merits” or “nonmerits” relief or on an improper designation of such a motion as a motion to alter or amend the judgment. *See Budinich v. Becton Dickinson And Co.*, 108 S.Ct. 1717 (1988); *Buchanan v. Stanships, Inc.*, 108 S.Ct. 1130 (1988). In the present case, however, Ernst & Whinney (“E & W”) has presented precisely the sort of analysis which has been firmly rejected by this Court. Indeed, except for the observation that Fed.R.Civ.P. 59(e), Fed.R.App.P. 4(a) and § 1291 work together, each and every one of E & W’s contentions conflicts with the decisions of this Court.

I. E & W’S ANALYSIS IGNORES THE DEFINITION OF RULE 59(e) AND THE REPEATED ADMONITION THAT AN INCORRECT LABEL WILL NOT TRANSFORM A MOTION INTO A RULE 59(e) MOTION.

E & W initially argues that the Osternecks’ request for prejudgment interest “on the understanding that if the request were granted the judgment would be ‘amended,’ is literally a ‘motion to alter or amend the judgment’ within the express language of Rule 59(e).” (Brief of Respondent (“E & W Brief”) pp. 10-11). E & W’s initial argument fails, however, because it ignores the definition of a Rule 59(e) motion and the repeated admonition that an incorrect label will not bring a motion under Rule 59(e).

Rule 59(e) by definition covers only those motions which ask the court to correct an error in or similarly revise a previous decision. *White v. New Hampshire Dept.*

of *Empl. Sec.*, 455 U.S. 445, 450-52 (1982); *Buchanan*, 108 S.Ct. at 1131. By definition, therefore, Rule 59(e) cannot extend to the Osternecks' request for *supplemental* relief, which was *expressly deferred* by the trial court until after entry of judgment on a jury verdict on all claims, because the issue of the supplemental relief was not encompassed in or erroneously excluded from a previous decision. See *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 324 (1986).

Moreover, the record in this case and basic common sense demonstrate the fallacy in E & W's assertion that the Osternecks' "motion sought a 'substantive alteration' of the rights adjudicated by the merits judgments." (See E & W Brief, p. 11). The Osternecks' motion for prejudgment interest and the supporting brief show that rather than seeking to alter, revise, correct or change the amount of compensatory damages awarded by the jury and adjudicated in the merits judgment, the Osternecks *accepted* the amount of compensatory damages awarded by the jury and adjudicated in the judgment.

Brief in Support of Plaintiff's Motion for Award of Prejudgment Interest.

...

The verdict and judgment . . . on the federal securities claims and the Georgia Common Law and Statutory Fraud Claims [was] in the amount of two million six-hundred thirty-two thousand, two hundred thirty-four dollars (\$2,632,234.00) as compensatory damages. . . .

. . . [Thus] the amount of \$2,632,234.00 as compensatory damages is the amount of damages the Plaintiffs suffered on September 8, 1969.

(See J.A. pp. 8, 12-13). Of necessity, the request for prejudgment interest was *based* on the adjudication of compensatory damages in the verdict and judgment. (*Id.*).

Thus, the motion did not seek to revise or alter the amount adjudicated by the judgment, but only to add supplemental relief to the judgment which was due as a result of the judgment. Furthermore, because the Osternecks' motion did not seek an alteration of the rights adjudicated by the verdict and judgment, the trial court's statement that final judgment could be "amended" to reflect the addition of prejudgment interest is of no effect. See *e.g. Buchanan*, 108 S.Ct. at 1132.

The cases cited by E & W following its assertion that the Osternecks' motion was " 'precisely the sort of alteration or amendment contemplated by Rule 59(e),' " cannot remedy the flaws in E & W's argument. (See E & W Brief, p. 11). *Gray v. Dukedom Bank*, 216 F.2d 108 (6th Cir. 1954), did not even involve a motion for prejudgment interest and is therefore inapposite. Of the cases cited by E & W which did involve prejudgment interest, most involved postjudgment motions which sought to revise the judgment by increasing or decreasing the amount of prejudgment interest *that had already been adjudicated* in the judgment and are therefore totally consistent with the Osternecks' arguments. See *McConnell v. MEBA Medical and Benefits Plan*, 759 F.2d 1401, 1404 (9th Cir. 1985) (motion to change prejudgment interest rate almost a year after award of prejudgment interest); *Elias v. Ford Motor Co.*, 734 F.2d 463, 465-466 (1st Cir. 1984) (motion to change the rate of a previous award of prejudgment interest from 8% to 12%); *Hoffman v. Celebrezze*, 405 F.2d 833, 834-835 (8th Cir. 1969) (motion to delete previously

awarded prejudgment interest); *Spurgeon v. Delta Steam Ship Lines, Inc.*, 387 F.2d 358, 359 (2d Cir. 1967) (prejudgment interest was expressly included in prior judgment).

The remaining cases cited by E & W cannot determine the question under review because they conflict with this Court's clarification of the scope of Rule 59(e) in *White*. See *Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir. 1983); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45 (2d Cir. 1982); *Lee v. Joseph E. Seagram & Sons, Inc.* 592 F.2d 39, 42 (2d Cir. 1979). Moreover, if these cases had analyzed the pre-*White* cases on which they blindly relied, they would have found that Rule 59(e) controlled the motions under review because the motions sought to correct an error encompassed in the judgment and not because they happened to involve prejudgment interest. For example, *Stern* cited *Scola v. Boat Frances R., Inc.*, 618 F.2d 147 (1st Cir. 1980), for its assertion that "if granting prejudgment interest is discretionary, the judgment must be amended pursuant to F.R.C.P. 59." *Stern*, at 747. *Scola*, however, merely held that a motion to delete prejudgment interest which had been erroneously included in a judgment should be brought under Rule 59(e) because it seeks to correct a previously entered decision of law. *Scola*, 618 F.2d at 153. Indeed, *Scola* went on to explain that not all postjudgment motions raising prejudgment interest issues should be brought under Rule 59(e). *Id.*

Similarly, *Goodman v. Heublein* cited *Lee v. Joseph E. Seagram & Sons, Inc.*, as support for its categorical statement that "Rule 59(e) generally applies to motions for prejudgment interest." *Goodman*, 682 F.2d at 45. In *Lee*, however, the plaintiffs sought to add prejudgment interest to the judgment pursuant to Rule 60(a) almost two

years after judgment had been entered. In a holding that prejudgment interest could not be added at such a late date, the Second Circuit focused on the purpose of Rule 60(a). In its discussion, the Court merely noted that "'where the failure to include interest resulted from an error of law, then relief may be had only by motion under Rule 59 and within its short time limits, by appeal, or by motion under 60(b).'" *Lee*, 592 F.2d at 43 (emphasis added).

The Court in *Lee* did *not* hold that a request for prejudgment interest must be brought pursuant to Rule 59(e) where the failure to include prejudgment interest in the judgment did not result from "an error of law" such as in the present case where the district court expressly deferred the issue until after entry of the judgment. As pointed out by *Jenkins*, such a motion is properly brought under Rule 7(b), the general motions rule. *Jenkins*, 785 F.2d at 738. Moreover, like *Scola*, *Lee* found that Rule 59(e) was only one of several procedures by which the plaintiff could seek to correct an erroneous decision to include or exclude prejudgment interest. Thus, like *Scola* and other cases cited by E & W, *Lee* is actually completely consistent with the Osternecks' arguments.

II. THE QUESTION OF WHETHER THE RESERVATION OF AN ISSUE TAINTS THE FINALITY OF A JUDGMENT ENTERED ON A JURY VERDICT ON ALL CLAIMS DOES NOT TURN ON WHETHER THE RESERVED ISSUE IS "COMPLETELY SEPARATE FROM THE MERITS."

E & W's second contention, that this Court's decisions in *White*, *Budinich*, and *Buchanan*, "require the [post-judgment] order to be completely separate from the

merits of the action," demonstrates that E & W has completely missed the point of these recent Supreme Court cases (See E & W Brief at 8, 15-21). *Budinich* expressly rejected the notion that the finality of a judgment under § 1291 should depend on whether the postjudgment order was completely separate from the merits. *Budinich*, 108 S.Ct. at 1720-21. As *Budinich* pointed out, an analysis which focuses on whether the postjudgment order was "completely separate" from the merits is not functional. *Id.*

Likewise, neither *White* nor *Buchanan* held that the finality and reviewability of a judgment depends on whether a pending postjudgment motion seeks relief which is "completely separate" from the merits. In *White* and *Buchanan*, the Court focused on whether a postjudgment motion would involve a "reconsideration of" or "change in" what had already been established by a decision on the merits, not whether postjudgment relief which had been expressly deferred for separate consideration might also be characterized as "merits" relief. *Buchanan*, 108 S.Ct. at 1131; *White*, 455 U.S. at 450-451. While the Court did note that requests for attorney's fees and costs cannot be Rule 59(e) motions because they require an inquiry separate from the merits, the Court did not hold that in order to be excluded from Rule 59(e), a motion must require an inquiry entirely separate from the merits. See *Buchanan*, 108 S.Ct. at 1131-32; *White*, 455 U.S. at 450-452.

As shown by *Budinich* and *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126 (1945), it is entirely possible to have two merits issues in a case which, although arising from the same facts, are collateral and independent of

each other. *Budinich*, 108 S.Ct. at 1721. *White*, *Buchanan* and *Budinich*, therefore, cannot be interpreted as requiring a characterization of postjudgment relief as "completely separate from the merits" in order to avoid the restrictions of Rule 59(e). Rather, these cases instruct that the proper focus is whether a postjudgment motion seeks to moot or substantively revise a merits judgment entered after trial or other disposal of the underlying claims. See *Budinich*, 108 S.Ct. at 1720-22; *Buchanan*, 108 S.Ct. at 1132; see also *FCC v. League of Women Voters*, 468 U.S. 364, 373 n. 10 (1984).

E & W's attempt to "import" additional limitations into § 1291 by focusing on restrictive language in *Cobbledick v. United States*, 309 U.S. 323 (1940), and in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), also demonstrates a misunderstanding of the approach to finality under § 1291 embraced by this Court in *Budinich*. In *Cobbledick*, Justice Frankfurter noted that a general purpose of the final judgment rule is to avoid the frustration of speedy justice by piecemeal appeals. Only a few years later, however, Justice Frankfurter authored the opinion in *Radio Station WOW*, in which he observed that "even so circumscribed a legal concept as appealable finality has a penumbral area" which must be administered with a degree of flexibility. *Radio Station WOW*, 326 U.S. at 123-125. Accordingly, Justice Frankfurter concluded in *Radio Station WOW* that the appeal should be permitted from the judgment notwithstanding a subsequent proceeding involving merits because the judgment would be "unaffected" by the subsequent proceeding. *Id.* at 126.

In explaining the need for an approach to § 1291 which preserves overall operational consistency, the Court in *Budinich* looked to Justice Frankfurter's words in *Radio Station WOW*, not those expressed in *Cobbledick*. E & W's reliance on *Cobbledick* in support of its overly restrictive description of the final judgment rule, therefore, is not justified.

Likewise, E & W's repeated reliance on *Cohen* and other cases dealing with the collateral order doctrine is completely misplaced. (See E & W Brief, pp. 16-26). The collateral order doctrine espoused by *Cohen* "recognizes that a limited class of prejudgment orders is sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available." *Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177, 1181 (1987). To qualify under the collateral order doctrine, a prejudgment decision must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from the final judgment. *Id.*

The restrictions imposed on the collateral order doctrine, however, stem from the *pretrial* stage of the order in question. As this Court has explained:

Pretrial appeals may cause disruption, delay and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference.

Stringfellow, 107 S.Ct. at 1184. Because the judgment at issue in the present case is not a pretrial judgment, the *Cohen* doctrine does not control its appealability nor do the reasons for the restrictive interpretation of the *Cohen* doctrine apply.

E & W's assertion that this Court effectively "imported" the limitations of the *Cohen* analysis into the construction of Rule 59(e) is without any basis whatsoever. (See E & W Brief, p. 19). The *White* opinion never even refers to *Cohen* or the collateral order doctrine, much less to its restrictions. Indeed, because *White*, *Buchanan* and *Budinich* all dealt with postjudgment motions like the one in the present case, by definition neither the collateral order doctrine nor its restrictive interpretation would apply. Indeed, the *Osternecks* only briefly mentioned the collateral order doctrine as one of several examples of this Court's pragmatic approach to finality under § 1291.

Accordingly, E & W's attempt to resurrect the "merits" analysis which was rejected by *Budinich* must fail.

III. EVEN IF A "MERITS" ANALYSIS WERE APPROPRIATE, THE OSTERNECKS' APPEAL WAS TIMELY BECAUSE THE MOTION FOR PREJUDGMENT INTEREST RAISED AN ISSUE COLLATERAL TO THE MERITS OF THE MAIN CAUSE OF ACTION.

In *Stewart v. Barnes*, 153 U.S. 456, 462, 464 (1984), this Court articulated the general rule that discretionary prejudgment interest "does not form the basis of the action," but is only an "incident" thereto and recoverable as a result of the "detention" of the underlying damages. Although *Stewart v. Barnes* used the word "incidental" to

describe discretionary prejudgment interest rather than the word "collateral," the principle described in *Stewart* is nonetheless relevant to the issue at hand. "Incidental" and "collateral" have been used interchangeably in discussing whether a motion falls within Rule 59(e) under the *White* analysis. See *West v. Keve*, 721 F.2d 91, 95 (3rd Cir. 1983); *Bygott v. Leaseway Transport Co.*, 637 F. Supp. 1433, 1438 (E.D.Pa. 1986). See also *Swanson v. American Consumer Ind., Inc.*, 517 F.2d 555, 561 (7th Cir. 1975) (motion for attorney's fees was "incidental" to the main litigation). Accordingly, for purposes of the *White* analysis, incidental discretionary prejudgment interest must be considered to be collateral to the main cause of action, and thus beyond the scope of Rule 59(e). See also 57 C.J.S. *Merits*, at 1070 (defining merits as strict legal rights as contradistinguished from all matters which depend upon the discretion of the court).

The Osternecks' request for prejudgment interest was in all respects collateral to the judgment on the merits. The issue of prejudgment interest was expressly reserved by the trial judge and characterized as a "separate" proceeding which was independent of the jury verdict and judgment entered on the merits, although conducted in the same lawsuit. Cf. *White*, (attorney's fee award was collateral although granted in same lawsuit which determined the merits). The Osternecks' request for discretionary prejudgment interest accepted the underlying jury verdict and merits judgment without seeking to change, moot, revise or alter it in any way.

IV. THIS COURT DID NOT LIMIT ITS ANALYSIS IN *WHITE* AND *BUDINICH* TO "AFFIRMATIVE POLICY REASONS UNIQUE TO ATTORNEY'S FEE AWARDS."

Asserting that *White* and *Budinich* were based on "affirmative policy reasons unique to attorney's fee awards and costs," E & W suggests that the Osternecks must do more than show that their motion for prejudgment interest was separate from the merits of the underlying cause of action. (E & W Brief, pp. 19, 21, 26). E & W's attempt to impose an additional burden on the Osternecks, however, fails for several reasons.

First, *White* and *Budinich* did not limit their approach to Rule 59(e) and § 1291 to "affirmative policy reasons unique to attorney's fees awards and costs." To the contrary, *White's* analysis was based on the definition of Rule 59(e) in general. Similarly, *Budinich* looked to general principles of finality applicable to all cases in determining the proper approach to § 1291. While *Budinich* did note the similarity of attorney's fees to costs in some cases, *Budinich* rejected a comparison of attorney's fees to costs as determinative of the issue because attorney's fees are not always equated with costs. *Budinich*, 108 S.Ct. at 1721. Instead, *Budinich* emphasized the elements of the traditional finality test in *Brown Shoe v. United States*, 370 U.S. 294 (1962); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507 (1950); and *Radio Station WOW*, *supra*. The reservation of an attorney's fees question will not affect the finality of a judgment on the merits because the resolution of the reserved issue will not moot, revise, or interfere with an appeal from the judgment on the merits. *Budinich*, 108 S.Ct. at 1722. The Osternecks have shown

that they meet all these requirements of the traditional finality test.

In addition, each attempt by E & W to distinguish attorney's fees from prejudgment interest for purposes of § 1291 finality fails. (See E & W Brief, pp. 21-22). For example, like attorney's fees, prejudgment interest has been treated as an element of the cost of litigation. Indeed, in recent proposed amendments to F.R.Civ.P. 68, the "cost-shifting" rule, the Advisory Committee specifically included prejudgment interest in the costs and expenses that must be borne pursuant to Rule 68 after an offer of settlement. See *Proposed Rules*, 102 F.R.D. 407, 432-437 (1984); 98 F.R.D. 337, 361-367 (1983). The proposed inclusion of prejudgment interest in the cost-shifting rule is intended to remedy all unnecessary costs of delay. See 102 F.R.D. at 433 (court shall consider the amount of additional "delay, costs, and expense" including "the interest that could have been earned"); 98 F.R.D. 362, 365 (unsuccessful offeree must pay the costs and expenses, including attorney's fees and interest). Thus, like the Ninth Circuit in *Jenkins*, the Advisory Committee on the Federal Rules has recognized that, like attorney's fees and other costs of litigation, the loss of the use of money is an expense resulting from the delay between the injury and judgment.

Moreover, this Court has emphasized that discretionary prejudgment interest has traditionally been treated as collateral relief which, like attorney's fees, does not form the basis of the underlying cause of action. *Stewart v. Barnes*, 153 U.S. at 462. The cases cited by E & W, *Garcia v. Burlington Northern Railroad Co.*, 818 F.2d 713 (10th Cir. 1987), and *Cinerama, Inc. v. Sweetmusic, S.A.*, 482 F.2d 66

(2nd Cir. 1973), do not require a different rule. In *Garcia*, prejudgment interest was erroneously excluded from the judgment after a prior request for its inclusion. *Garcia* expressly noted that the trial court did not reserve the question of prejudgment interest in that case. In addition, *Garcia* did not consider the definition of Rule 59(e) or whether a subsequent award of prejudgment interest would in any way change, moot or revise the rights adjudicated in the judgment. *Garcia*, therefore, does not control the present case. Similarly, *Cinerama* is inapposite because it was not based on *discretionary* prejudgment interest nor did it involve an appeal from a judgment entered after trial of the case on the merits.

Futhermore, attorney's fees cannot be distinguished from prejudgment interest on the basis that prejudgment interest will be awarded only to a prevailing plaintiff. Like prejudgment interest, an award of attorney's fees is frequently recoverable only by a plaintiff. See *e.g.* 15 U.S.C. § 15; 45 U.S.C. § 153(p); 46 U.S.C. § 941(c); 47 U.S.C. § 407. Nor can attorney's fees be distinguished on the ground that they are always an element of costs. At least 49 federal statutes differentiate between attorney's fees and costs. See *Marek v. Chesny*, 473 U.S. 1, 48-51 (1985) (dissenting opinion).

Likewise, E & W's characterization of prejudgment interest as "compensatory" is unavailing. Like prejudgment interest, an award of attorney's fees is "compensatory" relief designed to make the litigant whole, *Evans v. Jeff D.*, 475 U.S. 717, 730-731 (1986), observed that attorney's fees under 42 U.S.C. § 1988, as "an integral part of the remedies necessary to obtain compliance with the civil rights laws," are intended to "compensate" the civil

rights litigant. This Court similarly emphasized the compensatory nature of attorney's fees when in *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978), it stated that "an attorney's fees award . . . makes the prevailing party whole for expenses caused by his opponent's obstinacy."

Because attorney's fee awards are compensatory relief, a distinction between an attorney's fee award and other forms of compensatory damages is "a procedure of uncertain design and questionable validity." *Budinich v. Becton-Dickinson Co.*, 807 F.2d 155, 158 (10th Cir. 1986). As explained by *Budinich*:

"We reject as altogether too metaphysical the distinction between fees that are 'compensation for injury' and those that are not. All awards of fees make the prevailing party better off. Whether its benefit is 'really' a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation, thus making redress of the underlying hurt more likely in leaving the prevailing party with a greater net award, is a question of semantics rather than substance."

Id. Thus, E & W's repeated characterization of prejudgment interest as compensatory damages does not distinguish the Osternecks' prejudgment interest award from an attorney's fee award or render it inseparable from relief awarded by the jury on the merits of the Osternecks' securities claims.

Indeed, contrary to E & W's suggestion, in determining whether to award attorney's fees, a court must frequently review the merits and supporting evidence of the underlying claim, taking into consideration the nature of the case, its particular facts and the results achieved in the case. *Riverside v. Rivera*, 477 U.S. 561, 568 n. 3 (1986); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th

Cir. 1974). Moreover, a court will frequently review the merits of the claims in order to determine "whether or not the plaintiff's unsuccessful claims are related to the claims on which he succeeded, and whether the plaintiff achieved a level of success that makes it appropriate to award attorney's fees. . . ." *Riverside*, 477 U.S. at 568. Accordingly, E & W's attempt to distinguish prejudgment interest on the ground that "a recovery of prejudgment interest depends upon an assessment of the adequacy of Plaintiffs' compensation in light of facts presented at trial" has no merit. (See E & W Brief, p. 22).

Finally, E & W's attempt to distinguish prejudgment interest from attorney's fees on the ground that "the issue of attorney's fees is so independent of the main action as to support a separate federal action," like E & W's other assertions, is totally incorrect. (See E & W Brief, pp. 8, 20). It is established that the issue of attorney's fees is *not* so independent from the main action as to support a separate federal action. See *North Carolina Dept. of Transportation v. Crest Street Community Council, Inc.*, 107 S.Ct. 336 (1986).

As shown above, prejudgment interest simply cannot be distinguished from attorney's fees for purposes of determining finality under 28 U.S.C. §1291.

V. THE OSTERNECKS' DESCRIPTION OF THE FINALITY REQUIRED BY §1291 DOES NOT "EVISCERATE" PREDICTABLE AND CONSISTENT APPLICATION OF §1291.

The Osternecks' description of §1291 finality does not "eviscerate" predictable and consistent application of §1291 because it is based on the very same authorities

cited by this Court in *Budinich* and other recent cases in describing the proper application of Rule 59(e) and the final judgment rule. See *Budinich*, 108 S.Ct. at 1720-21 (citing *Brown Shoe, Dickinson, Radio Station WOW*); *Buchanan*, 108 S.Ct. at 1132 (citing *FCC v. League of Women Voters*); *FCC v. League of Women Voters*, 468 U.S. at n. 10 (citing *Minneapolis-Honeywell Reg. Co.*, 344 U.S. 206 (1952) and *Department of Banking v. Pink*, 317 U.S. 264 (1942)); *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 267 (1978) (citing *Department of Banking v. Pink*).

Furthermore, this test does not "render independently appealable any interim decision by a district court that would not be affected by further proceedings." (See E & W Brief, p. 28). The §1291 standard described by the Osternecks applies by its terms only to "an order effectively terminating the litigation," such as the final judgment entered in this case on the jury determination of all the claims. (See E & W Brief, p. 29). Thus, the partial summary judgment and other types of prejudgment cases cited by E & W do not support E & W's position.

In an effort to circumvent this point, E & W states that "[a]s this Court recently noted, to make finality turn upon whether an order is 'an order ending litigation' is 'ultimately question begging . . . ' *Budinich*, 108 S.Ct. at 1720-21." When the quote from *Budinich* is viewed in context, however, it becomes evident that the question begging analysis discussed and rejected by *Budinich* was an analysis based on a characterization of postjudgment relief as relating to the "merits," such as the one proposed by E & W in this case. *Budinich*, 108 S.Ct. at 1720-21. Thus, it is E & W's "merits" analysis that is circular.

E & W's concern that piecemeal appeals would run rampant if this Court rules in the Osternecks' favor likewise has no merit. As pointed out by *White* and *Budinich*, any threat of piecemeal appeals from this type of post-judgment proceeding would, as a practical matter, be nominal. See *Budinich*, 108 S. Ct. at 1722; *White*, 455 U.S. at 452-453.

VI. THE JANUARY JUDGMENT WAS APPEALABLE UNDER THE FINALITY STANDARDS DESCRIBED BY THE OSTERNECKS.

The prejudgment interest proceeding did not affect the finality of the January judgment under the finality standards described by the Osternecks because it did not moot or revise the rights established by the jury verdict, but only added to them without any alteration whatsoever. The compensatory nature of prejudgment interest does not mean that the award of prejudgment interest revised or altered the amount awarded by the jury. As shown above, attorney's fees also add compensatory damages yet they are not deemed to moot or revise the compensatory damages awarded by the jury or judgment. Like compensatory attorney's fees, prejudgment interest is supplemental and collateral to the compensatory damages established by the judgment.

Moreover, the January judgment meets the criteria set forth in Fed.R.Civ.P. 54(b). Judge Ward expressly determined that the prejudgment interest issue should be handled separately and ordered entry of the final judgment as soon as possible. (J.A. 4-5). In addition, the judgment in favor of E & W could not have been changed by any award of prejudgment interest.

VII THE UNIQUE CIRCUMSTANCES DOCTRINE IS NOT LIMITED TO RELIANCE ON AN EXPRESS STATEMENT BY THE DISTRICT COURT THAT AN APPELLANT'S NOTICE OF APPEAL WAS TIMELY.

The unique circumstances doctrine, although limited, is not as limited as E & W suggests. *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964), noted that the appellant relied on actions of his opponent as well as on statements by the district court in determining that the unique circumstances doctrine should apply. Similarly, *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 398 (7th Cir. 1981), found that the appellant's reliance on representations made by the appellee supported application of the unique circumstances doctrine.

Webb v. Department of Health and Human Services, 696 F.2d 101, 106 (D.C. Cir. 1982), held that the unique circumstances doctrine should apply even though the appellant did not rely on an express statement by the district court because of the unsettled state of the law on Rule 59(e) issues. *Butler v. Coral Volkswagen, Inc.*, 804 F.2d 612, 617 (11th Cir. 1986), and *Lieberman v. Gulf Oil Corp.*, 315 F.2d 403, 406 (2nd Cir. 1963), found that the unique circumstances doctrine could be supported by misleading actions of the clerk of the district court. Thus, the "laundry list of actions by various other parties" and by the "clerk" of the district court, as well as the express statements and actions of the trial judge, support the application of the unique circumstances doctrine in this case. (See E & W Brief, at 34.)

CONCLUSION

For the above reasons, as well as those set forth in the Brief of Petitioners, this Court should reverse the dismissal of the Osternecks' appeal against E & W and remand for consideration of the merits.

Respectfully submitted,

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